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No. 00-938

In the Supreme Court of the United States

ANDREW S. GRUMHAUS and
LESLIE GRUMHAUS DAVIDSON,
Petitioners,

v.

COMERICA SECURITIES, INC.,
as successor-in-interest to Comerica
Financial Services, Inc.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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In their Petition for a Writ of Certiorari (hereinafter cited as "Pet."), Petitioners Andrew S. Grumhaus ("Drew") and Leslie Grumhaus Davidson ("Leslie") identify a clear and substantial split in the courts of appeal as to the significance of prejudice in an analysis of arbitral waiver. Pet. at 15-24. In its Brief for the Respondent in Opposition (hereinafter cited as "Opp."), Respondent Comerica Securities, Inc. ("Comerica") opposes further review of this case by (i) asserting there is no "genuine conflict" on this issue, (ii) suggesting that the Petition fails to raise an "important question" and (iii) claiming that it has been prejudiced by the course of this litigation. Each of these propositions is demonstrably wrong and, in many respects, contradicted by the authorities cited in the opposition brief and the record below. In short, Comerica's brief reinforces, rather than refutes, the need for this Court to resolve the conflict among the circuits identified in the Petition.

I. COMERICA CANNOT NEGATE THE SUBSTANTIAL CIRCUIT SPLIT ON THE ROLE OF PREJUDICE IN AN ANALYSIS OF ARBITRAL WAIVER.

As Comerica would have it, the courts of appeals "uniformly evaluate a claim of waiver by looking to the totality of the circumstances and applying multiple factors." Opp. at 5. In connection with this "'uniform" evaluation, Comerica posits that prejudice to the party claiming waiver is but one of the factors used in the analysis. Opp. at 6. Indeed, Comerica goes so far as to characterize the diametrically opposed views of the circuits on the necessity of prejudice as "minor variations in the weight given to particular factors." Opp. at 4. As even Comerica's own authorities demonstrate, however, these "minor variations" are, in actuality, an irreconcilable circuit split on a pivotal

question: is prejudice to the party claiming waiver a threshold requirement to a finding of arbitral waiver?

As an initial matter, not all courts look to the "totality of the circumstances" in evaluating claims of arbitral waiver. For example, in *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156 (5th Cir. 1986), the Fifth Circuit held that "prejudice to the party seeking arbitration... is determinative of whether a court should deny arbitration on the basis of waiver." *Id.* at 1162. Indeed, the court in *Price* specifically noted the existence of the "totality of the circumstances" line of cases but expressed skepticism as to the propriety of "the use of criteria other than 'prejudice' to the party opposing arbitration in determining whether arbitration rights have been waived." *Id.* at 1162, fn2. Likewise, in *Menorah Insurance Co., Ltd v. INX Reinsurance Corp.*, 72 F.3d 218 (1st Cir. 1995), the First Circuit acknowledged the split, and contrasted its prior holdings that prejudice was a "litmus test" for claims of arbitral waiver with the "totality of the circumstances" approach employed in the Seventh and Tenth Circuits. *Id.* at 221, *citing Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1489 (10th Cir. 1994); *S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518, 1527 (7th Cir. 1993). Because prejudice had been clearly established, the *Menorah* court declined to reconsider its prior holdings. *Id.*

More importantly, Comerica misses the point when it presupposes that a "totality of the circumstances" analysis precludes a finding that prejudice is a threshold requirement of arbitral waiver. As Comerica's citation to *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 163 (2nd Cir. 2000), petition for cert. filed (Jan. 11, 2001) (No. 00-1119) demonstrates, even where a court employs a multi-factored analysis, prejudice may still be a threshold requirement to a

finding of waiver. Indeed, in the paragraph immediately preceding the one cited by Comerica, the *Crysen/Montenay* court held:

> **[A] party waives its right to arbitration when it engages in protracted litigation that prejudices the opposing party.** [P]rejudice as defined by our cases refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue. **Incurring legal expenses inherent in the litigation, without more, is insufficient evidence of prejudice to justify a finding of waiver.**

Id. at 162-63, *quoting PPG Industries, Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107-08 (2nd Cir. 1997) (emphasis added). The fact that even some majority-view courts consider factors in addition to prejudice in no way diminishes the importance of the prejudice inquiry as a threshold requirement in those courts. In *S & H Contractors, Inc. v. A.J. Taft Coal Co., Inc.*, 906 F.2d 1507, 1514 (11th Cir. 1990), the Eleventh Circuit explained that "[a] party has waived its right to arbitrate if, under the totality of the circumstances, the . . . party has acted inconsistently with the arbitration right, **and**, in so acting, has in some way prejudiced the other party." (emphasis added, internal citations omitted).

Comerica complains that Drew and Leslie have "generated a false conflict" by "lumping together" waiver claims involving plaintiffs and waiver claims involving defendants. Opp. at 10-12. To support this proposition, Comerica relies primarily upon a treatise by Professor Ian

MacNeil.[1] In that treatise, Professor MacNeil argues "quite a few" courts have "explicitly or impliedly" distinguished between plaintiffs and defendants—a distinction which Professor MacNeil advocates. *See* 2 Ian R. MacNeil, Federal Arbitration Law, § 21.3.2.1A (Supp. 1999). Nevertheless, while Drew and Leslie disagree with Professor MacNeil's characterization of the cases he cites, even Professor MacNeil acknowledges that not all courts recognize such a distinction. *See Id.* at fn 24p, *citing Stifel, Nicolaus & Co. v. Freeman*, 924 F.2d 157 (8th Cir. 1991); *see also Id.* at § 21.3.2.2, *citing Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777 (3rd Cir. 1975) (defendant/third-party plaintiff did not waive arbitration by filing suit against third-party defendant). Likewise, it is beyond dispute that the *vast* majority of cases on arbitral waiver make no mention of Professor MacNeil's suggested distinction.[2]

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[1] In a footnote, Comerica also cites to two cases which offer poor support for its position. The first, a 60-year-old case entitled *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 989 (2nd Cir. 1942), rejected claims that a **defendant** had waived arbitration. The second, *In re Ballard Shipping Co.*, 752 F.Supp. 546 (D.R.I. 1990), is selectively and misleadingly quoted by Comerica. Comerica excerpts the following language from *Ballard Shipping*: "a plaintiff's initiation of a suit has been considered a determinative factor in a waiver analysis." Opp. at 11, fn4. The full quotation, in context, is as follows: "**In most cases a plaintiff's mere filing of a complaint does not constitute waiver**. However, a party's initiation of suit is certainly a relevant factor in analyzing whether it has waived its right to compel arbitration. **In some cases**, a plaintiff's initiation of a suit has been considered a determinative factor in a waiver analysis." 752 F.Supp. at 549 (emphasis added, internal citations omitted).

[2] Comerica's citation to Professor MacNeil's treatise is ironic in light of Comerica's position that there is no true conflict among

Further, as Professor MacNeil recognized, the Eighth Circuit's opinion in *Stifel, Nicolaus & Co. v. Freeman*, 924 F.2d 157 (8th Cir. 1991) "runs against the grain" of his argument. 2 Ian R. MacNeil, Federal Arbitration Law, § 21.3.2.1A at fn 24p. In *Stifel*, the Eighth Circuit held that the plaintiff had not waived its right to arbitration, even though it had initiated litigation by filing a lawsuit in federal court. The court reasoned that although the plaintiff had initially acted inconsistently with its right to arbitrate, there could be no waiver because the defendant had not been prejudiced.

Comerica attempts to explain away *Stifel* by stating that "the Eight Circuit pulled back from *Stifel*" in *Ritzel Communications, Inc. v. Mid-Am Cellular Tel. Co.*, 989 F.2d 966 (8th Cir. 1993). Opp. at 12. Comerica's claim is difficult to fathom. Far from "pulling back" from *Stifel*, *Ritzel* not only reaffirms *Stifel*, but **relies** on it. The *Ritzel* court held that "we will find waiver where the party claiming the right to arbitrate: (1) knew of an existing right to arbitration; (2) acted inconsistently with that right; **and** (3) **prejudiced the other party by these inconsistent acts**." *Ritzel*, 966 F.2d at 968, *citing Stifel*, 924 F.2d at 158 (emphasis added). Applying the *Stifel* standard to the case before it, the *Ritzel* court found "obvious and substantial" prejudice—and therefore a waiver. *Id.* at 971. The *Ritzel* decision simply does not and cannot support Comerica's argument. The *Stifel* decision--and its recognition of prejudice as a threshold

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the circuits. In fact, Comerica's citation from Professor MacNeil is taken from a section entitled "Prejudice: The Key to Waiver." § 21.3.2. More specifically, they quote from a subsection discussing the unique developments in the Seventh Circuit, entitled, "Dissent from the Prejudice Requirement." § 21.3.2.1A.

requirement of arbitral waiver--remains the law of the Eighth Circuit, and of a majority of other federal circuits.

Even within the Seventh Circuit, the plaintiff/defendant distinction urged by Comerica has not been uniformly recognized. In one recent decision, a Seventh Circuit panel affirmed a finding that the customer/plaintiffs had not waived their right to arbitration by commencing a purported federal class action against a commodity broker. *Iowa Grain Co. v. Brown*, 171 F.3d 504, 505-07, 511 (7th Cir. 1999).[3] While evaluating the claim of waiver under a "totality of the circumstances" analysis, the Seventh Circuit panel permitted parties to proceed to arbitration, even though they were initially plaintiffs in a non-arbitral forum. *See Id.*

II. THE LINK BETWEEN PREJUDICE AND WAIVER HAS REAL IMPORTANCE FOR THE VINDICATION OF ARBITRATION RIGHTS.

Comerica endeavors to downplay the significance of the issues in this case, arguing that (i) an analysis of arbitral waiver "is not subject to any pro-arbitration policy presumption" (Opp. at 13) and (ii) "[e]ven if prejudice were deemed a required element, as petitioners propose, the impact would be nonexistent or negligible." (Opp. at 8). Neither of these arguments holds water.

In arguing that the waiver analysis is not subject to a pro-arbitration policy presumption, Comerica cites *First Options, Inc. v. Kaplan*, 514 U.S. 938 (1995). Opp. at 13. This case simply does not speak to the issue. Instead, as

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[3] In a striking similarity to this case, the plaintiffs in *Iowa Grain* sought arbitration following the dismissal of their purported class action **without prejudice**. *Iowa Grain*, 171 F.3d at 507.

Comerica correctly states earlier on the same page of its brief, *First Options* holds that the existence of an arbitration agreement is judged according to neutral contract principles. However, as this Court has made absolutely clear, an analysis of arbitral waiver must be conducted with a pro-arbitration perspective. *See, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 24-25 ("[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself **or an allegation of waiver**")(emphasis added). By ignoring this rule of construction, Comerica undermines the national policy favoring arbitration. Pet. at 24-28.

In its argument that the prejudice requirement--if adopted--would have a minimal impact on the waiver analysis (Opp. at 8), Comerica cites two completely inapposite First Circuit cases—both of which involved district court findings of prejudice. *See Navieros Inter-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304 (1st Cir. 1997) (party seeking arbitration waited until day before trial began to request arbitration); *Menorah Ins. Co.*, 72 F.3d at 221 (defendant initially *opposed* arbitration, then waited 14 months before reversing course, during which time plaintiff had obtained a default judgment against defendant). These cases--which involved substantial litigation activity--are irrelevant to the question before the Court. That question--whether arbitral waiver can be found in the **absence** of prejudice to the party opposing arbitration--plainly has the potential to change the outcome of this and many other cases. Here, the district court made detailed findings of fact, and concluded that Comerica had **not** been prejudiced by Drew and Leslie's litigation in state court—which the district court described as "brief and minimal" and "skeletal"—prior to the request for arbitration.

Pet. App. at 20a-21a. The Seventh Circuit did not overturn the district court's finding on this issue.[4] Accordingly, in any of the eight majority rule circuits, Drew and Leslie would have been permitted to enforce their right to arbitrate with Comerica, and this case might well be over by now. Instead, because this case arose in a circuit which takes a radically expansive view of arbitral waiver, Drew and Leslie can only seek relief on this issue from this Court.

III. COMERICA HAS NOT SUFFERED PREJUDICE.

Comerica argues, in a footnote, that it was "inherently prejudiced by [Drew and Leslie's] long delay in seeking arbitration." Opp. at 9, fn 3. Comerica explains that its prejudice stems from the fact that this alleged delay will allow witnesses' memories to fade, and evidence to be lost. *Id.* Comerica even goes so far as to accuse Drew and Leslie of "bad faith" in seeking arbitration.[5] These arguments and

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[4] Comerica implicitly suggests that the court of appeals **did** reverse the District Court's factual findings on this issue, because the Seventh Circuit concluded that "Comerica was not *unduly* prejudiced by the Grumhaus children's delay in seeking arbitration." Pet. App. 11a, *cited in* Opp. at 9, emphasis added by Comerica. The word "unduly" simply cannot be stretched to this point. Given the trial court's express finding that Comerica was **not** prejudiced (Pet. App. at 21a), and because the panel necessarily reviewed findings of fact under a clear error standard (Pet. App. at 5a), the language quoted by Comerica is most logically read as a grudging **affirmance** of the district court's finding of no prejudice.

[5] Comerica's "bad faith" allegation relies wholly on a line in the Seventh Circuit's opinion, which reads as follows: "Understandably disappointed with [the state court's dismissal of the complaint], the Grumhaus children decided that they wanted to arbitrate." App. at 7a, cited in Opp. at 14. This statement in

accusations are flatly contradicted by the decision of the district court, which found:

> Comerica should have known since March 1998 that arbitration was a possible course of action, and has known since May 1998 that plaintiffs intended to pursue arbitration of its dispute. Comerica did not contest plaintiffs' right to arbitrate until February 1999, when it responded to the NASD's notice of plaintiffs' arbitration claim against it. Comerica cannot, and does not, attempt to argue that it was surprised when plaintiffs filed for arbitration or that its claims and defenses will be adversely affected if required to arbitrate this dispute. Comerica will suffer no prejudice from an order compelling arbitration.

Pet. App. at 21a-22a. Notably, none of these factual findings was reversed by the Court of Appeals.[6] Accordingly, Comerica's belated claims of prejudice have no foundation in the record. It is far too late in the day for these claims to be asserted now.

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the opinion is wholly unsupported by the record, and is directly contrary to the express findings of the district court judge who was closest to the proceedings. In any event, the statement does not support Comerica's gratuitous and unfounded accusation. Moreover, after failing to interpose any objection to its dismissal from the state court case--where the dismissal was taken for the express and stated purpose of pursuing arbitration--and then seeking to intervene back into the same case from which it had previously been dismissed, Comerica's complaints about "bad faith" and "tactical litigation" ring hollow.

[6] *See* footnote 4, *supra*.

Finally, it is worth noting that Comerica did have an opportunity to litigate Drew and Leslie's claims on an expedited timetable—by participating in the NASD arbitration. Comerica could not have been prejudiced by this choice of forum, given that **its own account opening documentation** listed the NASD as a permissible venue. For Comerica to complain about the passage of time during this litigation, after having resisted arbitration in one of its chosen fora, is perplexing.

CONCLUSION[7]

The Petition for Certiorari should be granted.

Respectfully submitted,

/s/_____

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[7] Drew and Leslie concur with Comerica that this Court's decision in *Green Tree Fin. Corp. v. Randolph*, 121 S. Ct. 513 (2000)--rendered after the filing of the Petition -- has resolved the second question presented in the Petition.